Chang Chong Foo & Anor v Shivanathan

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-340-90
HARUN HASHIM, MOHAMED YUSOFF AND PEH SWEE CHIN SCJJ
12 AUGUST 1992

Tort *— Negligence — Road accident — Defendant pleaded guilty to charge of dangerous driving — Plaintiff admitted making error of judgment — Whether defendant wholly liable for accident*

Damages (Personal Injury or Death) *— Assessment of damages — Loss of future earnings — Whether living expenses should be deducted — Amount to be deducted — Civil Law Act 1956 s 28A(2)(c)(iii)*

The plaintiff was riding a motor cycle along a straight stretch of road when a car driven by the defendant in the opposite direction collided into him. According to the plaintiff, when he first saw the car it was overtaking another vehicle and had encroached on his side of the road. He took evasive action by swerving to the left on the sidetable but it was too late to avoid collision. In cross-examination the plaintiff admitted that he had made an error of judgment in thinking at the time that the defendant would be able to overtake in time and avoid a collision. The defendant did not give evidence at the trial. The defendant, had before the trial, pleaded guilty to a charge of dangerous driving and had been convicted of that charge. The learned judge accepted the evidence of the plaintiff and held the defendant 100% to blame for the accident, taking into account his plea of guilty. He awarded the plaintiff $37,324 for damages for loss of future earnings. The appellant appealed. It was contended that by his own admission, the plaintiff should have been held 30% to blame for the accident. It was further contended that the award for damages should be reduced by a certain sum for living expenses in accordance with s 28A(2)(c)(iii) of the Civil Law Act 1956.

Held, allowing the appeal in part:

(1) On the evidence as a whole, the so-called admission of error of judgment was only a suggestion of such a possibility because throughout his evidence, the plaintiff said he took evasive action on sight of the defendant's oncoming car.

(2) It was proper for the learned judge to admit the evidence of the plea of guilty by the defendant in this case. The learned judge's finding that the defendant was wholly negligent did not rest entirely on the admission of this evidence but on the totality of the evidence before him. On the evidence as a whole, the court agreed with the learned judge's finding that the defendant was 100% to blame for the accident. The appeal on the point of negligence was therefore dismissed.

(3) Section 28A(2)(c)(iii) applied to this case as s 28A is intended for a living plaintiff. In assessing the damages for loss of future

earnings, the learned judge should have made a deduction for living expenses of the plaintiff which is comprised of the amount spent on petrol for his motor cycle and the cost of his meals at work. The loss of future earnings should be reduced to $20,640.

[Bahasa Malaysia summary

Plaintif sedang menunggang motosikal di jalan yang lurus apabila sebuah kereta yang dipandu oleh defendan dari arah yang bertentangan telah melanggarnya. Mengikut plaintif apabila dia mula-mula melihat kereta itu ia sedang memotong kenderaan yang lain dan telah masuk ke sebelah jalannya. Dia mengambil tindakan bersifat mengelak dengan membeluk dengan tiba-tiba ke kiri ke tepi jalan itu tetapi adalah terlambat untuk mengelak daripada berlanggar. Dalam pemeriksaan balas plaintif telah mengaku bahawa dia salah pertimbangan dengan memikir pada masa itu yang defendan boleh sempat memotong kereta itu dan mengelak suatu pelanggaran. Defendan tidak memberi keterangan di perbicaraan itu. Defendan sebelum perbicaraan telah mengaku salah atas pertuduhan memandu kereta cara berbahaya dan telah disabitkan atas pertuduhan itu. Hakim yang arif telah menerima keterangan plaintif dan memutuskan defendan 100% bertanggungjawab bagi kemalangan itu. Beliau memberi ganti rugi kepada plaintif sebanyak $37,324 bagi kehilangan pendapatan masa depan. Perayu telah membuat rayuan. Telah dihujahkan bahawa dengan pengakuannya sendiri, plaintif seharusnya diputuskan 30% bertanggungjawab bagi kemalangan itu. Telah dihujahkan selanjutnya bahawa award bagi ganti rugi harus dikurangkan dengan jumlah yang tertentu untuk perbelanjaan hidup mengikut s 28A(2)(c)(iii) Akta Undang-Undang Sivil 1956.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Pada keterangan seluruhnya, pengakuan yang dikatakan itu tentang salah pertimbangan adalah hanya suatu saranan akan kemungkinan seperti itu kerana sepanjang keterangannya, plaintif mengatakan dia mengambil tindakan bersifat mengelak sebaik sahaja dia melihat kereta defendan yang datang dari arah hadapan.

(2) Adalah wajar bagi hakim yang arif itu untuk menerima keterangan akuan bersalah oleh defendan dalam kes ini. Pendapat hakim yang arif bahawa defendan adalah sama sekali cuai tidak bergantung semata-mata atas penerimaan keterangan itu tetapi atas keseluruhan keterangan di hadapan beliau. Pada keterangan seluruhnya, mahkamah bersetuju dengan pendapat hakim yang arif bahawa defendan adalah 100% bertanggungjawab bagi kemalangan itu. Oleh kerana itu rayuan atas perkara kecuaian itu ditolak.

(3) Seksyen 28A(2)(c)(iii) terpakai dalam kes ini kerana s 28A dimaksudkan untuk plaintif yang masih hidup. Dalam mentaksir ganti rugi bagi kehilangan pendapatan masa depan hakim yang arif seharusnya menolak perbelanjaan hidup plaintif yang terdiri daripada amaun yang dibelanjakan bagi petrol untuk motosikalnya dan belanja makannya di tempat kerja. Ganti rugi bagi kehilangan pendapatan masa depan hendaklah dikurangkan ke $20,640.

Cases referred to

1 *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194 (folld)
2 *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 (folld)
3 *Tan Kim Chuan & Anor v Chandu Nair* [1991] 1 MLJ 42 (refd)
4 *Amar Singh v Chin Kiew* [1960] MLJ 77 (folld)
5 *Harris v Empress Motors Ltd; Cole v Crown Poultry Packers Ltd* [1983] 3 All ER 561; [1984] 1 WLR 212 (refd)
6 *White v London Transport Executive* [1982] 1 All ER 410; [1982] 2 WLR 791; [1982] QB 489 (refd)
7 *Panickar v Chwee May Kwong & Anor* [1958] MLJ 136 (refd)

Appeal from: Civil Suit No 25–142–86 (High Court, Johore Bahru)

RK Nathan (*RK Nathan & Co*) for the appellants/defendants.
S Gunasegaran (*Guna & Co*) for the respondent/plaintiff.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): The plaintiff was riding a motor cycle along a straight stretch of road when a car driven by the defendant in the opposite direction collided into him. According to the plaintiff, when he first saw the car it was overtaking another vehicle and had encroached on his side of the road. He took evasive action by swerving to the left on to the side-table but it was too late. The learned judge accepted the evidence of the plaintiff and his version as to how the collision occurred and held the defendant 100% to blame for the accident. He said he was fortified in his finding by the fact that the defendant had pleaded guilty in the magistrate's court to a charge of dangerous driving and had been convicted of that charge.

It was argued, however, that if the learned judge had accepted the evidence of the plaintiff, he should have also accepted that part of the evidence where the plaintiff admitted in cross-examination that he had made an error of judgment in thinking at the time that the defendant would be able to overtake in time and avoid a collision. If the learned judge had done so, he would have held that the plaintiff was 30% to blame for the accident.

The damage to the motor cycle was largely on the off-side. This would be consistent with the plaintiff's version that the collision occurred as he swerved to the left. The plaintiff himself was injured on his right leg. So was the plaintiff's pillion rider whose injuries were also on the right side of the body and a broken neck which caused his death on the same day. The defendant's car came to a stop after the collision on the side-table on the plaintiff's side of the road.

In *Lim Ah Toh v Ang Yau Chee & Anor*,[1] Raja Azlan Shah J (as he then was) said at p 195:

> When a motor vehicle collides with an oncoming vehicle on the wrong side of a straight stretch of road, that is prima facie evidence of negligence. See *Menon v Pigeonneau* [1957] MLJ 85 and *Tan Giok Hue v Lim Swee Peng* [1960] MLJ 190. The onus is therefore upon the defendants to show that the motor-van found itself where it did without any negligence on their part.

In the instant case, the defendant did not give evidence at the trial. The defence relied entirely on the 'admission' of the plaintiff in cross-examination that he committed an error of judgment and therefore was partly to blame for the accident. This is what he said:

> At time of collision my motor cycle was in motion. I saw car and took evasive action. The car was very close by and so I could not avoid. I thought the car could overtake and completed overtaking safely. I was wrong. My vision was slightly affected by the rain.

Earlier on, also in cross-examination, he said:

> When the car was about 3¼ chains I tried to avoid the accident by swerving to the left. I swerved the minute I saw the car.

On examination of the evidence as a whole, we are of the view that the so-called admission of error or judgment is only a suggestion of such a possibility because throughout his evidence, the plaintiff said he took evasive action on sight of the defendant's oncoming car.

With regard to the learned judge's admission of the fact that the defendant had pleaded guilty to a charge of dangerous driving we would refer to two decisions of Raja Azlan J (as he then was). In *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors*,[2] he said at p 121:

> Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighs against the fourth defendant: see *Noor Mohamed v Palanivelu* [1956] MLJ 114.

And in *Lim Ah Toh v Ang Yau Chee & Anor*,[1] he said at p 196:

> The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed v Palanivelu* [1956] MLJ 11; *EA Long v Wong Chin Wah* [1957] MLJ 163.

We are of the view that it was proper for the learned judge to admit the evidence of the plea of guilty by the defendant in this case. We are also of the opinion that the learned judge's finding that the defendant was wholly negligent did not rest entirely on the admission of this evidence but on the totality of the evidence before him. On the evidence as a whole, we agree with the learned judge's finding that the defendant was 100% to blame for the accident. The appeal on the point of negligence is thus dismissed.

The plaintiff was 24 years old at the time of the accident. He was a temporary daily-rated worker at a palm oil mill as a kernel meal packer. His wages were $8.50 per day with additional shift allowance of 75 sen pd if he worked the second shift and $1.25 pd if he worked the third shift and double pay if he worked on a rest day. He worked 26 days in the month of August 1986 including three rest days and was paid $272.50 for that month. He worked only seven days in the month of September 1986 and was paid $66.75. He stopped work on 13 September 1986 (when he was due to work the second shift from 3 pm) because of the accident that day at 2 pm where he lost his right leg which had to be amputated above the

knee. He has been unemployed ever since although he tried to obtain alternative employment after being fitted with an artificial leg.

The learned judge in awarding damages held:

> Loss of future earnings.
> I accept plaintiff was earning $310 pm. That is his loss. I award a percentage loss of 70%. He was 24 years old at the relevant time. I use a multiplier of 16 years, ie 192 months. Deducting 20 months we have 172 months $310 × 70% × 172 months — $37,324.

plus interest at 8% from date of judgment to date of realization.

Mr Nathan says the monthly earnings is $282.50 from which should be deducted a sum of $185 for:

(i) petrol consumption	$60
(ii) $5 a meal per day for 25 days	$125

thereby leaving a sum of $97.50 say $100; and the award should be $100 × 172 months = $17,200. The award of $37,324 should therefore be reduced to $17,200. This deduction in living expenses is in accordance with s 28A(2)(c)(iii) of the Civil Law Act 1956 ('the Act'). Mr Gunasegaran says the plaintiff's monthly earnings should be calculated on the basis that he worked 30 days a month and that it should be $339.25. He further said s 28A(2)(c)(iii) does not apply. The learned judge based the monthly earnings of $310 on the evidence of the plaintiff's employer who said that if the plaintiff worked for a full month his wages would be $310. He did not work a full month in August and that was why he received less.

We see no reason to differ from the learned judge's finding on this point.

In view of the arguments placed before us, we think it is necessary to reproduce s 28A in its entirety for ease of reference and to enable it to be read as a whole. Section 28A(1) came into effect on 30 May 1975 and s 28A(2) came into effect on 1 October 1984. Section 28A states:

> (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —
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> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;
> (b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or
> (c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.
>
> (2) In assessing damages under this section —
>
> (a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;
> (b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;
> (c) in awarding damages for loss of future earnings the Court shall take into account:

(i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.

(d) in assessing damages for loss of future earnings the Court shall take into account that:

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

In *Tan Kim Chuan v Anor v Chandu Nair*,[3] this court said at p 44:

> The marginal note to s 28A which reads 'Damages in respect of personal injuries' suggests that the provisions are exhaustive and mandatory.

The question is whether s 28A(2)(c)(iii) applies to the facts of this case.

The Act separates the method of assessing damages as to whether the plaintiff dies or survives from his injuries as follows:

(a) Fatal accident cases

If the death of a person is caused by the wrongful act, neglect or default of another person, then compensation to the family of the deceased person for loss occasioned by his death may be claimed under s 7, which also provides how such damages are to be assessed.

(b) Personal injury cases

In respect of personal injury which does not result in death, the assessment of damages is governed by s 28A. Subsection (1) provides that any moneys payable under (a), (b) or (c) shall not be taken into account. Subsection (2) provides the method of assessing damages in such cases. What concerns us presently is sub-s (2)(c)(iii) which states:

> In awarding damages for *loss of future earnings* the Court *shall* take into account:
> ...
> any *diminution* of any *such amount* as aforesaid by such sum as is proved or admitted to be the *living expenses* of the plaintiff at the time when he was injured. (Emphasis added.)

Such amount referred to in (iii) is the amount of his *earnings* at the time of the injury referred to in (ii). *The diminution* referred to in (iii) is the *living expenses* of the plaintiff at the time he was injured.

On a plain reading of the subsection we are of the view that by the use of the word *diminution* in (iii) the intention of the legislature is that in awarding damages for loss of future earnings *the entire sum of his earnings* should not be used to calculate the amount payable under sub-s 2(c). In the instant case that sum is $310 pm. This diminution, however, is subject to proof by the defendant or admitted by the plaintiff. There is no proof here because the defendant did not give evidence. The plaintiff did give evidence and he said that:

(a) He went to work by motor cycle and spent $60 pm on petrol.
(b) His meals at work cost him $5 pd.

Mr Nathan says both these items are living expenses under (iii). Mr Gunasegaran says living expenses can only be deducted if a person is dead, if alive he needs living expenses in order to live. We cannot accept Mr Gunasegaran's argument, because s 28A is clearly intended for a living plaintiff and therefore s 28A(2)(c)(iii) applies to the facts of this case.

What then is meant by *living expenses* in (iii)? It is trite law that words in a statute must be given their ordinary meaning. The *Shorter Oxford English Dictionary* defines 'living' as: 'The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance.' 'Expenses' means 'Money out of pocket'.

In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: see *Amar Singh v Chin Kiew*.[4] This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in s 7(3)(iv)(c) which came into force on 1 October 1984 and states:

> In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall: take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.

It will be seen that the same language is used in both s 7(3)(iv)(c) and s 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s 7 and s 28A bear the same meaning.

In *Harris v Empress Motors Ltd; Cole v Crown Poultry Packers Ltd*,[5] the Court of Appeal held that:

(i) the ingredients that go to make up 'living expenses' are the same whether the deceased was young or old, single or married, or with or without dependants;

(ii) the sum to be deducted as living expenses is the proportion of the deceased's net earnings that he would have spent exclusively on himself to maintain himself at the standard of life appropriate to his situation;
(iii) any sums that he would have expended exclusively to maintain or benefit others will not form part of his living expenses and will not be deductible from his net earnings.

In *White v London Transport Executive*,[6] Webster J said at p 418:

> ... in the cost of maintaining himself I include the cost of his housing, heating, food, clothing, necessary travelling and insurances and things of that kind ...

Where no details are given as to the deceased's living expenses, the Court of Appeal in *PR Panickar v Chwee May Kwong & Anor*[7] made an arbitrary deduction of $50 pm as the deceased's living expenses out of monthly earnings of $250.

In the instant case, the appellants rely on the respondent's admission that he spent $60 pm on petrol to go to work and $5 pd for meals while at work as his living expenses which should be deducted in assessing damages for loss of future earnings under s 28A(2)(c)(iii). We agree that this is a fair deduction in the circumstances of this case. The appeal on quantum is allowed. For purposes of calculation, however, the $5 pd for meals should be multiplied by 26 as that is the number of normal days of work in a month under the Employment Act 1955. The order of the learned judge in respect of post-trial loss of earnings of $37,324 is hereby reduced to $20,640 calculated as follows:

(i) Petrol pm	$ 60
(ii) Meals at $5 pd × 26	$130
Total	$190

Monthly earnings — $310
Less living expenses — $190
Loss of future earnings $120 × 172 months = $20,640.

For the reasons stated, we allow the appeal in part with half costs. Deposit to be refunded to the appellants.

Appeal allowed in part.

Report by Prof Ahmad Ibrahim